



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2006-0605; FRL-9903-84-OAR]

RIN 2060-AR99

Prevention of Significant Deterioration for Particulate Matter Less Than 2.5 Micrometers - Significant Impact Levels and Significant Monitoring Concentration: Removal of Vacated Elements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On January 22, 2013, the United States Court of Appeals for the District of Columbia Circuit (the Court) granted a request from the EPA to vacate and remand to the EPA portions of two Prevention of Significant Deterioration (PSD) regulations, promulgated in 2010 under the authority of the Clean Air Act (CAA), regarding the Significant Impact Levels (SILs) for particulate matter less than 2.5 micrometers (PM_{2.5}). The Court further vacated the portions of the PSD regulations establishing a PM_{2.5} Significant Monitoring Concentration (SMC). The EPA is amending its regulations to remove the vacated PM_{2.5} SILs and SMC provisions from the PSD regulations in the Code of Federal Regulations (CFR). This action is exempt from notice-and-comment rulemaking because it is ministerial in nature. The EPA will initiate a separate rulemaking in the future regarding the PM_{2.5} SILs that will address the Court's remand.

DATES: This final rule is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2006-0605. All documents in the docket are listed on the *www.regulations.gov* website. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Garwood, Office of Air Quality Planning and Standards (C504-03), U.S. EPA, Research Triangle Park, North Carolina 27709, telephone number (919) 541-1358, facsimile number (919) 541-5509, email: *garwood.ben@epa.gov*.

SUPPLEMENTARY INFORMATION

I. Does this regulation apply to me?

The entities potentially affected by this rule include new and modified major stationary sources in all industry groups. To determine whether your facility would be affected by this action, you should carefully examine the applicability criteria in 40 CFR 51.166 and 52.21. Entities potentially affected by this final action also include state, local and tribal governments that issue PSD permits.

II. Background and Rationale for this Final Action

The PSD permit program applies to any new major stationary source or major modification at a stationary source located in a designated attainment or unclassifiable

area for any regulated NSR pollutant.¹ The PSD regulations require, among other things, compliance with emission limitations achievable through installation of best achievable control technology (BACT); an air quality analysis to show that the newly constructed source or modification will not cause or contribute to a violation of any National Ambient Air Quality Standard (NAAQS) or applicable PSD increment², including analysis of air quality monitoring data; an assessment of impacts on visibility and other conditions in national parks and similar federal lands in certain areas; an additional impacts analysis as defined by 40 CFR 51.166(o) and 40 CFR 52.21(o); and an opportunity for public involvement. The EPA regulations for the PSD program are contained in 40 CFR 51.166 (applicable to air agencies that issue permits under EPA-approved state implementation plans (SIPs)) and 40 CFR 52.21 (the federal PSD program applicable to permits issued by the EPA or by delegated air agencies).

In 1997, the EPA revised its NAAQS for particulate matter to include standards for a new indicator, PM_{2.5}, 62 FR 38652 (July 18, 1997). The EPA revised the PM_{2.5} NAAQS in 2006, 71 FR 61144 (October 17, 2006), and also in 2013, 78 FR 103086 (January 15, 2013). On October 20, 2010, the EPA published a final rule establishing PSD provisions to implement increments, SILs and an SMC for PM_{2.5}. Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})

¹ The PSD program stems from part C of title I of the CAA.

² An “increment” is the mechanism used in the PSD program to define significant deterioration of ambient air quality for a criteria pollutant. An increment is the maximum allowable increase in ambient concentrations of a pollutant in an area relative to a specified baseline concentration. In general, a change in ambient pollutant concentrations greater than the amount defined by an increment is thus considered to significantly deteriorate air quality and cannot be allowed.

Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 75 FR 64864 (Oct. 20, 2010). The SILs are screening tools that have been applied in PSD permitting to demonstrate that the proposed source's allowable emissions will not cause or contribute to a violation of the NAAQS or increment (such demonstration is required to obtain a permit). The SMC has been used to exempt sources from a requirement in the CAA to collect preconstruction monitoring data for up to 1 year before submitting a permit application in order to help determine existing ambient air quality.

On December 17, 2010, the Sierra Club petitioned the Court to review the 2010 PM_{2.5} SILs and SMC final rule. On January 22, 2013, the Court granted a request from the EPA to vacate and remand to the EPA portions of the PSD regulations (40 CFR 51.166(k)(2) and 52.21(k)(2)) establishing the SILs for PM_{2.5} so that the EPA could reconcile the inconsistency between the regulatory text and certain statements in the preamble to the 2010 final rule. *Sierra Club v. EPA*, 705 F.3d 458, 463-64 (D.C. Cir. 2013). The Court further vacated the portions of the PSD regulations (40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c)) establishing a PM_{2.5} SMC, finding that the EPA lacked legal authority to adopt and use the PM_{2.5} SMC to exempt permit applicants from the statutory requirement to compile and submit ambient monitoring data. *Id.* at 468-69.

III. Final Action

This final action removes from the CFR the affected PM_{2.5} SILs and SMC provisions vacated by the Court's decision. Because the Court specifically vacated and remanded the PM_{2.5} SILs in sections 51.166(k)(2) and 52.21(k)(2), the EPA is removing

the text and reserving the paragraphs in sections 51.166(k)(2) and 52.21(k)(2). The Court explicitly declined to vacate the PM_{2.5} “significance levels” at section 51.165(b)(2), and accordingly we are not taking any final action to make any change to that section. The EPA will initiate a separate rulemaking in the future regarding the PM_{2.5} SILs that will address the remand.

Moreover, because the Court vacated the SMC provisions in 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c), the EPA is revising the existing concentration for the PM_{2.5} SMC listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to zero micrograms per cubic meter (0 µg/m³). The EPA is not entirely removing PM_{2.5} as a listed pollutant in the SMC provisions because to do so might lead to the issuance of permits that contradict the holding of the Court as to the statutory monitoring requirements. Both sections 51.166(i)(5)(iii) and 52.21(i)(5)(iii) permit the reviewing authority to exempt a permit applicant from the monitoring requirements if “[t]he pollutant is not listed in paragraph (i)(5)(i) of this section.” Were EPA to completely remove PM_{2.5} from the list of pollutants in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) of the PSD regulations, PM_{2.5} would no longer be a listed pollutant and the paragraph (iii) provision could be interpreted as giving reviewing authorities the discretion to exempt permit applicants from the requirement to conduct monitoring for PM_{2.5}, in contravention of the Court’s decision and the CAA. Instead, the EPA is revising the concentration listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to 0 µg/m³. This means that there is no air quality impact level below which a reviewing authority has the discretion to exempt a source from the PM_{2.5} monitoring requirements. By continuing to include PM_{2.5} as a

pollutant in the list contained in sections 51.166(i)(5)(i) and 52.21(i)(5)(i), with the numerical value replaced with $0 \mu\text{g}/\text{m}^3$, we avoid any concern that paragraph (iii) of the two affected sections could be applied to excuse permit applicants from adequately addressing the monitoring requirement for $\text{PM}_{2.5}$.

The EPA is taking this action as a final rule without providing an opportunity for public comment or a public hearing because the EPA finds that the Administrative Procedure Act (APA) good cause exemption applies here. In general, the APA requires that general notice of proposed rulemaking shall be published in the *Federal Register*. Such notice must provide an opportunity for public participation in the rulemaking process. However, the APA does provide an avenue for an agency to directly issue a final rulemaking in certain specific instances. This may occur, in particular, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest. *See* 5 USC 553(b)(3)(B). The EPA has determined that it is not necessary to provide a public hearing or an opportunity for public comment on this action because the amendment of the regulations to remove the affected provisions for the $\text{PM}_{2.5}$ SILs and SMC is a necessary ministerial act. As the Court vacated the $\text{PM}_{2.5}$ SILs and SMC provisions, the EPA no longer has the authority to allow the use of the affected provisions after the Court's final decision. Therefore, in as much as this action to remove the affected regulatory text simply implements the decision of the Court, it would serve no useful purpose to provide an opportunity for public comment or a public hearing on this issue.

In addition, notice and comment would be contrary to the public interest because it would unnecessarily delay the removal of the unlawful PM_{2.5} SIL and SMC provisions from the CFR, which could result in confusion on the part of the regulated industry and state, local and tribal air agencies about how the Court's decision affects the PSD regulations and PSD permitting. Promulgation of this rule soon after the Court's decision serves to clarify that sources cannot continue to rely on the PSD PM_{2.5} SILs and SMC as was previously allowed. Given the substantial costs to the owner/operator of projects associated with delays and uncertainty, it is in the public interest for the EPA to amend the CFR without delay.

For these reasons, the EPA finds good cause to issue a final rulemaking pursuant to section 553 of the APA, 5 U.S.C. 553(b)(B). Therefore, the requirements of CAA section 307(d), including the requirement for public comment and hearing on proposed rulemakings, do not apply to this action.

IV. Implementation

The Court's vacatur of the PM_{2.5} SILs in 40 CFR 51.166(k)(2) and 52.21(k)(2) and the SMC provisions in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) means that these provisions can no longer be relied upon by either permit applicants or permitting authorities. The EPA has already stopped relying on sections 52.21(k)(2) and 52.21(i)(5)(i)(c) of the federal PSD regulations when we issue PSD permits. We have also advised state and local air agencies to which we have delegated our authority to issue permits under the federal PSD program (codified at section 52.21) not to rely on these provisions. Permitting authorities with EPA-approved SIPs containing any or all of the

affected PM_{2.5} SIL and SMC provisions previously allowed by sections 51.166(k)(2) and 51.166(i)(5)(i)(c) should remove their corresponding SILs provisions and revise the numerical value of the PM_{2.5} SMC to 0 µg/m³ (or make equivalent changes) as soon as feasible, which may be in conjunction with the next otherwise planned SIP revision. Furthermore, the EPA advises that these provisions as reflected in the existing state and local EPA-approved SIPs are unlawful and may not be applied even prior to their removal from the SIPs.

The Agency has provided a question and answer document regarding the implications of the Court's decision in various contexts (Guidance on the Applicability of the January 22, 2013 Circuit Court Decision on PM_{2.5} Significant Impact Levels and Significant Monitoring Concentration). This document is available on the agency's website located at <http://www.epa.gov/nsr/guidance.html>.

V. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993), and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has previously approved the information collection requirements for the PSD program, including the requirements

addressed by this rule, under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060-0003.

Pursuant to title I, part C, of the Act, the PSD program requires the owner or operator to obtain a permit prior to either constructing a new major stationary source or making a major modification to an existing major stationary source. The information collection for sources under PSD results from the requirement for owners or operators to submit applications for NSR permits. For reviewing authorities, the information collection results from the requirement to process permit applications and issue permits, and to transmit associated information to the EPA. The EPA oversees the PSD program, and the information collected by sources and reviewing authorities is used to ensure that the program is properly implemented.

We anticipate that some sources currently in the permitting process will no longer be able to apply the PM_{2.5} SMC to assert an exemption from the statutory requirement to submit air quality monitoring data as defined by CAA section 165(e)(2). The air quality monitoring data required to be submitted by permit applicants is often readily available as part of existing representative ambient air quality data available for public review. We also anticipate that some sources currently in the permitting process will no longer be able to apply the PM_{2.5} SIL as an automatic “safe harbor” to satisfy the statutory requirement to show that the proposed source will not cause or contribute to a violation of the NAAQS or increment under CAA section 165(a)(3). Some sources may be required to conduct a more comprehensive air quality analysis in order to make the

demonstration required by the statute where, for example, background air quality is close to the level of the NAAQS.

Any burden anticipated as a result of this rule has already been addressed in the analysis conducted for the final rule establishing PSD provisions to implement increments, SILs and a SMC for PM_{2.5}. Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (PM_{2.5}) Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 75 FR 64864 (Oct. 20, 2010). In that rule, over the 3-year period covered by the ICR³, we estimated an average annual burden totaling about 29,000 hours and \$2.8 million for all industry entities that would be affected by the final rule. In addition, burden was calculated for state and local agencies to revise their SIPs to incorporate the changes. Over the 3-year period covered by the ICR for the 2010 rule, we estimated that the average annual burden for all State and local reviewing authorities will total about 7,500 hours and \$581,000. Burden is defined at 5 CFR 1320.3(b). The burden calculated in the 2010 rule was a conservative estimate as the analysis assumed that the same number of sources would collect and submit air quality monitoring data and conduct a comprehensive air quality analysis despite the promulgation of the PM_{2.5} SMC and SILs in that rule. Therefore, the current rule does not add any further burden that was not already anticipated and addressed by the previous 2010 rule and ICR.

³ Information Collection Required for Changes to 40 CFR 51 and 52: Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC) June 2010.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

Today's good cause final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because although the rule is subject to the APA, the agency has invoked the "good cause" exemption under 5 USC 553(b), and therefore it is not subject to the notice-and-comment requirement.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This good cause final action addresses the Court's vacatur of certain PSD regulations.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This good cause final action addresses the Court's vacatur of certain PSD regulations. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. This good cause final action addresses the Court's vacatur of certain PSD regulations. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an

environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply,

Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and

adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this good cause final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a major rule as defined by 5 U.S.C. 804(2). This rule will be effective on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

VI. Statutory Authority

The statutory authority for this action is provided by sections 165-169 and 301 of the Act as amended (42 U.S.C. 7475-7479 and 7601).

VII. Judicial Review

Under section 307(b)(1) of the Act, judicial review of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Under section 307(b)(2) of the CAA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects

40 CFR Part 51

Administrative practices and procedures, Air pollution control, Environmental protection, Intergovernmental relations.

40 CFR Part 52

Administrative practices and procedures, Air pollution control, Environmental protection, Incorporation by reference, Intergovernmental relations.

Dated: November 26, 2013.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows.

**PART 51 - REQUIREMENTS FOR PREPARATION, ADOPTION, AND
SUBMITTAL OF IMPLEMENTATION PLANS**

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401 - 7671q.

2. Section 51.166 is amended as follows:

a. By removing the words “4 $\mu\text{g}/\text{m}^3$, 24-hour average,” and adding in their place “0 $\mu\text{g}/\text{m}^3$ ” in paragraph (i)(5)(i)(c).

b. By adding a note to paragraph (i)(5)(i)(c).

c. By removing and reserving paragraph (k)(2).

The addition reads as follows:

§51.166 Prevention of significant deterioration of air quality.

* * * * *

(i) * * *

(5) * * *

(i) * * *

(c) Note to paragraph (i)(5)(i)(c): In accordance with *Sierra Club v. EPA*, 706 F.3d 428 (D.C. Cir. 2013), no exemption is available with regard to $\text{PM}_{2.5}$.

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**PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS**

3. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

4. Section 52.21 is amended as follows:

a. By removing the words “4 $\mu\text{g}/\text{m}^3$, 24-hour average,” and adding in their place
”0 $\mu\text{g}/\text{m}^3$ ” in paragraph (i)(5)(i)(c).

b. By adding a note to paragraph (i)(5)(i)(c).

c. By removing and reserving paragraph (k)(2).

The addition reads as follows:

§52.21 Prevention of significant deterioration of air quality.

* * * * *

(i) * * *

(5) * * *

(i) * * *

(c) Note to paragraph (i)(5)(i)(c): In accordance with *Sierra Club v. EPA*, 706 F.3d 428
(D.C. Cir. 2013), no exemption is available with regard to $\text{PM}_{2.5}$.

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[FR Doc. 2013-29196 Filed 12/06/2013 at 8:45 am;
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